1980

City of South Salt Lake v. Debbie L. Hanna : Brief for Appellant

Utah Supreme Court

W. Andrew McCullough; Attorney for Defendant-Appellant;
Clinton Balmforth; Attorney for Plaintiff-Respondent;

1N THE SUPREME COURT OF UTAH

STATE OF UTAH

---ooo0ooo---

CITY OF SOUTH SALT LAKE, A Municipal Corporation, Plaintiff and Respondent, vs. DEBBIE L. HANNA, Defendant and Appellant.	:	Case No. 17081

---ooo0ooo---

BRIEF OF APPELLANT

---ooo0ooo---

Appeal From a Judgment of Conviction Entered in the Third Judicial District Court in and for Salt Lake County.
Honorable Christine M. Durham

---ooo0ooo---

W. ANDREW MCCULLOUGH
Attorney for Defendant and Appellant
930 South State Street Suite 10
Orem, Utah 84057

CLINTON BALMFORTH
South Salt Lake City Attorney
Attorney for Plaintiff and Respondent
2500 South State Street
Salt Lake City, Utah 84115

TABLE OF CONTENTS

Constitutional Provisions Cited

Statutes Cited

Ordinances Cited

Cases Cited

Treatise Cited

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

---ooo0ooo---

CITY OF SOUTH SALT LAKE, A Municipal Corporation Plaintiff and Respondent vs. DEBBIE L. HANNA Defendant and Appellant	:	Case No. 17081

---ooo0ooo---

BRIEF OF APPELLANT

---ooo0ooo---

STATEMENT OF NATURE OF CASE

Appellant appeals from a conviction of a violation of §3B-8-5(3) of the Revised Ordinances of the City of South Salt Lake (1974 as amended) which ordinance Appellant claims is unconstitutional and invalid.

DISPOSITION IN THE LOWER COURT

This Class B Misdemeanor was first prosecuted in the South Salt Lake Justice Court and was tried without a jury before Judge George H. Searle on January 15, 1980. The conviction in that trial was appealed on February 5, 1980, and the matter was retried before a jury on March 28, 1980. This trial resulted in a second conviction and a judgment on that conviction by Judge Christine M. Durham.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of conviction and a determination that the ordinance of the City of South Salt Lake under which she was convicted is unconstitutional and invalid.

STATEMENT OF FACTS

Defendant was employed, on October 17, 1979, as a masseur in a massage establishment and health studio known as The King's Palace, located at 60 West 3300 South, in the City of South Salt Lake, Salt Lake County. On that evening, Officer James L. Burns, a Salt Lake Vice Officer on duty as a special officer of the South Salt Lake Police Department entered the premises and purchased a massage. Officer Burns testified that during the course of the massage, he stated to the Defendant that he had expected something different from what he was getting, and specifically that in previous massage parlor encounters, the masseuse had been nude. He then testified that the Defendant stated that there were "extras available" and that for $20.00 he could receive a "local". He testified that it was his experience that a "local" was a massage of the genitals. The Defendant was placed under arrest by Officer Burns and others on the premises of The King's Palace for alleged violation of §3B-8-5(3) of the Revised Ordinances of the City of South Salt Lake (1974 as amended) which states that "it shall be unlawful for a

masseur to touch or offer to touch or massage the genitalia of customers." Section 3B-8-8 of the Revised Ordinances of the City of South Salt Lake goes on to make such a violation a class B misdemeanor.

Prior to jury trial in the Third Judicial District Court, Defendant was previously found guilty in the Justice Court of the City of South Salt Lake, sitting without a jury. An appeal was taken from that decision. Prior to the first trial, a motion to dismiss based on the invalidity of the subject ordinance was presented to the Justice Court in writing, accompanied by a memorandum in support thereof, which motion was denied. A similar motion was made in the Third Judicial District Court prior to trial in the instant case, and that Court refused to hear oral arguments on the matter before denying it, based upon the prior decision of the Third Judicial District Court, Judge Homer F. Wilkinson presiding, denying declaratory relief against the same ordinance, based also upon its invalidity. The accompanying motion to dismiss the charge because of entrapment on the part of the police officer was also denied by the Third Judicial District Court, after a hearing thereon. The previous attempt to have this ordinance declared invalid in a declaratory judgment action is now pending before this Court in Hollingsworth vs. City of South Salt Lake, Case No. 16831. The arguments to follow are in large part based upon arguments set forth in appellants'

brief in the previous matter.

ARGUMENT

POINT I

SECTION 3B-8-5(3) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS INVALID AS EXCEEDING THE DELEGATED AUTHORITY GIVEN TO CITIES BY ARTICLE XI SECTION 5 OF THE CONSTITUTION OF UTAH AND SUBSEQUENT ACTS OF THE UTAH LEGISLATURE. IN ADDITION, THIS SECTION VIOLATES ARTICLE I SECTION 24 OF THE UTAH CONSTITUTION.

The Constitution of the State of Utah, in Article XI, Section 5 grants cities "the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law . . . . " (emphasis added) To this is added the language of Article I Section 24 stating that "All laws of a general nature shall have uniform operation." Obviously allowing cities to pass ordinances changing the effect of general state laws within the boundaries would render these laws less than uniform in operation. This the Constitution forbids. The legislature has enumerated what these powers are in §10-8-1 et seq. U.C.A. In Salt Lake City vs. Sutter, 61 U. 533, 216 P. 234 (Utah 1923) this Court ruled that the legislature does have the power to enumerate powers of cities, and that all powers and municipalities are derived from the legislature.

Section 10-8-41 U.C.A. states that cities:

> . . . may supress and prohibit the keeping of disorderly houses, houses of ill fame or assignation, or houses kept by, maintained for, or resorted to or used by, one or more persons for acts of perversion, lewdness or prostitution within the limits of the city and within three miles of the outer boundaries thereof, and may prohibit resorting thereto for any of the purposes aforesaid; they may also make it unlawful for any person to commit or offer or agree to commit an act of sexual intercourse for hire, lewdness or moral perversion within the city, or for any person to secure, induce, procure, offer or transport to any place within the city any person for the purpose of committing an act of sexual intercourse for hire, lewdness or moral perversion, or for any person to receive or offer or agree to receive or direct any person into any place or building within the city for the purpose of committing an act of sexual intercourse for hire, lewdness or moral perversion, or for any person to aid, abet or participate in the commission of any of the foregoing; and they may also stress and prohibit gambling houses and gambling, lotteries and all fraudulent devices and practices, and all kinds of gaming, playing at dice or cards, and other games of chance, and the sale, distribution or exhibition of obscene or lewd publications, prints, pictures or illustrations.

Section 10-8-51 U.C.A. gives the city further powers in the area of prostitution, as follows:

> This may provide for the punishment of tramps, street beggars, prostitutes, habitual disturbers of the peace, pickpockets, gamblers and thieves, or persons who practice any game, trick or device with intent to swindle.

In addition to the statutes cited, §10-8-84 U.C.A. states:

> They may pass all ordinances and rules, and make all regulations, <u>not repugnant to law</u>, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide

> for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; provided, that the punishment of any offense shall be by fine in any sum less than $300.00 or by imprisonment not to exceed 6 months, or by both such fine and imprisonment. (emphasis added).

These three statutes were cited by the City of Salt Lake as authority for passing the ordinance at issue in the case of Salt Lake City vs. Allred, 19 U.2d 254, 430 P.2d 371 (Utah 1967). Defendant in that case was convicted of violating a city ordinance by "aiding and abetting in the commission of a crime in that the Defendant directed a police officer to a certain apartment to obtain sexual intercourse for hire." 430 P.2d at 372.

There as here, the ordinance was attacked as being beyond the power of the city, under the grant of authority given them by the legislature. The Court, in answer to that question, in specifically referring to the three statutes already cited by Defendant stated:

> It will be noted that the first two of the statutes above referred to deal with prostitution. While the ordinance we are considering contains no definitions of the terms used therein, nevertheless, it is quite evident that the ordinance was not designed to deal with prostitution. The generally accepted definition of prostitution is the practice of a female offering her body to indiscriminate sexual intercourse with men. The ordinance in question goes beyond the grant of power by the legislature to the cities to supress prostitution. 430 P.2d at 372. (Emphasis added)

Further, the Court stated that:

> It is elementary that municipalities are limited by express grants of power from the legislature or as necessarily implied from such grants. It appears that the ordinance we have under consideration goes beyond the grant that any legislative authority granted to the city and is therefore invalid. 430 P.2d at 373.

The Court held for Defendant, but later reversed itself, on a petition for rehearing (See Salt Lake City vs. Allred 20 U.2d 298, 437 P.2d 434 (Utah 1968)) when one Justice disqualified himself, allowing a District Court Judge to sit. The Court appeared then to change its mind on the construction of §10-8-84 U.C.A. and stated that it gave the city much wider power than those powers given by §§10-8-41 and 10-8-51 U.C.A. Judge Cowley, now speaking for the Court stated:

> It is a well settled rule that it is a proper exercise of the police power as set forth in the above statute to preserve and protect the public morals, and any practice of business which has a tendency to weaken or corrupt the morals of those who follow it, as shown by experience, is such conduct as affects the public morals. 437 P.2d at 435.
>
> We are of the opinion that the general police power is a sufficient grant of authority to authorize the city ordinance involved in this case unless "prohibited by statute or inconsistent therewith." 437 P.2d at 436 (emphasis added)

This language, of course, must be viewed somewhat cautiously, as it was done in a sharply divided case, with a District Court Judge deciding the balance of power, and was decided well before other cases appearing to cut back sharply on the power which the Allred Court allowed the city to exercise. Those cases will be

cited further on in this brief. In addition, the Court relied, in its decision in Allred, on the absence of conflict between the state statute and the city ordinance, and the harmony between them. There is no such harmony in this case. Further, there are observations in the dissents of the two Justices who had previously been in the majority, worth presenting. Justice Tuckett stated:

> I dissent. After carefully considering the main opinion and the legal problems raised by this appeal, I am constrained to adhere to the position taken in the prior opinion of the court. I do not agree that the general grant of police power to the cities by §10-8-84, U.C.A. (1953) was intended by the legislature to authorize adoption of the ordinance we are here concerned with. It would seem that had the legislature intended such broad powers it would not have made specific grants of power to cities to deal with certain aspects of prostitution as provided for by §10-8-41 and §10-8-51, U.C.A. (1953). The latter statutes would be unnecessary and superfluous. 437 P.2d at 438.

Justice Henriod, supporting Justice Tuckett, stated:

> The two dissenters in the former case cast their lot entirely under title 10-8-41, U.C.A. (1953). The author of the opinion in the present case pays no attention to those votes but bases his conclusion entirely on title 10-8-84, U.C.A. (1953), and does not assign 10-8-41 as a basis for his conclusion. It would seem to me that this new departure amounts to a dissent from the dissenters. Under such circumstances it appears to be sort of an affirmance, not reversal of the former case. 437 P.2d at 438.
>
> In the former case Mr. Justice Tuckett simply said what every lawyer should know, that cities cannot exercise powers not delegated to them by the state of its constitution. Each Justice soundly and fundamentally said that the subject ordinance (32-1-1) was an attempt to exercise a power not

so delegated. 437 P.2d at 439.

In the second Allred decision, the Court ruled that the ordinance in question prohibited an act intimately associated with prostitution and that the city, in aiding the state in stopping prostitution, could make the one extra step to make it more difficult for prostitution to flourish. The city is not doing that here. They are, instead, making a new class of sexual offense and the ordinance, as will be shown, is not only out of harmony and inconsistent with the statute, it is in direct conflict with it.

Since the Allred decisions, this Court has had several occasions to rule on the powers of municipalities to make ordinances in the same area regulated by the state. The Court has uniformally ruled that if the state is already regulating that area of the law, the city should not be involved. In State vs. Salt Lake city, 445 P.2d 691 (Utah 1968) this Court ruled invalid an ordinance of Salt Lake City licensing private non-profit social clubs. The city had simply copied the state licensing requirement, changing only enough words to make it apply to city officers, rather than state officers. The Court quoted extensively from Abbott vs. City of Los Angeles, 3 Cal. Rptr. 158, 349 P.2d 974 (Cal. 1960) in stating that

> the invalidity arises, not from conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of 'conflict'

> is it possible to confine local legislation to its proper field of supplementary regulation. 445P.2d at 694.

In Allgood vs. Larsen, 545 P.2d 530 (Utah 1976) the Defendant was convicted of a violation of §32-3-3 of the Revised Ordinances of Salt Lake City. That ordinance made the crime of trespass a class B misdemeanor. Section 76-6-206(3) of the Utah Code made the same crime an infraction, for which no jail sentence could be imposed. The criminal Defendant successfully obtained a Writ of Habeas Corpus in the Third Judicial District Court, and that Writ was upheld by this Court. The Court, in upholding the Writ, declared:

> The District Court ruled that "since the state law provides no jail sentence for trespass, which is classified as an 'an infraction,' that the city cannot impose a greater sentence than that provided by state law, and it is for that reason that the Court grants the petition ofr a Writ of Habeas Corpus." With this we agree and affirm the trial Court.
>
> Salt Lake City seeks to exceed the public policy declared by the legislature relating to a new class of offense. It does not have that power of amendment. 545 P.2d at 532. (emphasis added).

Further, the Court quoted from McQuillian, Municipal Corporations, §17.15, at page 326, in declaring the law in Utah:

> . . . if the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void The charter ordinance penalty cannot exceed that of the state law. 545 P.2d at 532.

Justice Crockett in dissent stated as follows:

> The legislature has specifically granted authority to the city to prohibit criminal trespass by §10-8-50, Utah Code Annotated 1953, wherein it states that cities have the power to:
>
> . . . provide for the punishment of trespass and such other petty offenses as the board of commissioners or city council may deem proper. 545 P.2d at 532.

In other words, the majority of the Court ruled that a City may not decide the punishment of a crime, when that punishment appears to conflict with the state pronouncement on the same subject, even though there is a specific grant of authority for so setting the penalty. The state, then, by making a later pronouncement of public policy, is deemed to have overruled its earlier pronouncement that cities exercise specific grants of power. In this case, the state has defined the perimeters of what is and is not illegal sexual conduct, and any previous grant of power to the city, is not sufficient to override what the state has pronounced.

In the case of Layton City vs. Speth, 578 P.2d 828 (Utah 1978) Defendant was convicted under a city ordinance which duplicated the language of §58-37-8(2)(ii) which stated that it shall be unlawful:

> For any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place, knowlingly and intentionally to permit the same to be occupied by persons unlawfully possessing, using, or distributing controlled substances therein.

The Court, apparently returning once again to the more strict construction of the statutes granting legislative authority to the cities which characterized the earlier opinion in Salt Lake City vs. Allred, ruled the ordinance must be set aside, in the following language:

> At the time of the alleged offense the statutes of Utah permitted cities certain powers including a prohibition against ". . . the sale, giving away or furnishing of intoxicating liquors or narcotics, or of tobacco to any person under 21 years of age: . . . The statute has since been amended but the amendment has no bearing on the present case.
>
> Cities are also empowered by statute to pass all ordinances, rules, and regulations for carrying into effect all powers and duties conferred and "such as are necessary and proper to provide for the safety and preserve the health, and promote prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, . . .
>
> The ordinance in question is not one which is necessary for carrying into effect any of the purposes above mentioned. 578 P.2d at 829.

While, then, the second Allred decision appeared to give cities a grant of authority to protect safety, health, morals, peace and good order, comfort and convenience of the city, which grant of authority was in addition to the many specified grants, the Layton City vs. Speth decision, appears to make that position untenable. In fact, in that decision, the Court very clearly made a rather strict interpretation of what the city can and cannot do in the area of drugs. The Court clarified

its view of city powers even further, in stating:

> By the statute it is clear that the only authority given to the city was to prohibit anyone from selling, giving away, or furnishing marijuana to a person under 21 years of age. Mr. Speth is not charged with doing any of those unlawful acts; and that part of the ordinance which attempts to make it unlawful for an owner of an automobile, knowingly and intentionally, to permit persons to occupy it and possess, use, or distribute marijuana must be held to be beyond the power of the city to enact. The ordinance is, therefore, invalid. 578 P.2d at 829.

Although the Court then went on to determine that there was a conflict in penalties, in that a second offense under the state statute was treated more harshly than a second offense under the city ordinance, it is clear that the Court did not make this decision based on the difference of penalties. The Court made its decision based on the fundamental decision that the city did not have a wide range of additional police powers not specifically granted in Title 10 Chapter 8 of the Utah Code. Obviously the city had a strong argument that the ordinance was protective of the public health, safety and morals. In fact, assuming that the state was correct in labeling marijuana a dangerous drug in the first place, such an ordinance on the part of the city may well have exercised the protective functions that the city stated as justification. Nevertheless, the ordinance was both beyond the power of the city to enact, lacking a specific grant of authority, and was in conflict with state regulations in

the area.

A. brief reference should be made here to §§76-10-1201 through 76-10-1226 U.C.A. (1953) as amended, in which the State of Utah takes a strong stand against public displays of nudity and other sexual activities. In this series of statutes the state legislature recognized that it was enacting a comprehensive scheme of regulation regarding pornography and similar offense. It therefore, in §76-10-1210 specifically gave authority to the cities to further regulate the materials complained of. It does not appear the legislature felt that cities would have such authority without the specific delegation of that statute, despite the language of §10-8-84 seemingly giving the cities broad authority to improve the public morals. The legislature wanted it clear that cities have the right especially to protect minors against materials which might otherwise be too readily available for them. It was the intent of the legislature, as specifically stated in §76-10-1210(3) "to give the broadest meaning permissable under the federal and state constitutions to the words offends public decency' in §76-10-803." Section 76-10-803 defines a "public nuisance" but note that such broad language is confined to the area of pornography, prohibited by the above cited statutes. No such broad declaration on the part of the legislature has been enacted to give cities like authority in the area at issue

here. That can only be due to a decision on the part of the legislature that the conduct they have proscribed with the proper proscription to be applied to consentual adult activity in a non-public place.

The public policy of the State of Utah regarding illegal sexual activity is clearly defined in §76-10-1301 eq seq. U.C.A. (1953) as amended. Section 76-10-1301 defines "sexual activity" and "house of prostitution" as follows:

> (1) "Sexual activity" means intercourse or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.
>
> (2) "House of prostitution" means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

Section 76-10-1302 U.C.A. (1953) as amended, then goes on to prohibit prostitution in the following words:

> (1) A person is guilty of prostitution when:
> (a) he engages or offers or agrees to engage in any sexual activity with another person for fees; or
> (b) is an inmate of a "house of prostitution"; or,
> (c) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.
>
> (2) Prostitution is a class B misdemeanor, provided that any person who was twice convicted under this section shall be guilty of a class A misdemeanor.

It could easily be argued, under the doctrines set forth in Layton City vs. Speth, that any regulation of prostitution

whatsoever on a local level is now void, as being in conflict with the state law. The penalty phase, seen as sufficient conflict in both the Layton City vs. Speth and Allgood vs. Larsen cases, must be in dispute, as cities have no power to pass ordinances punishable on the second offense as a class "A" misdemeanor. While the court is not asked here to determine whether cities have any power under present circumstances to regulate prostitution at all, there is surely a question presented in this case as to whether cities may re-define prostitution, thus coming in direct conflict with state law and depriving state law of its uniform effect, contrary to Article XI Section 5 and Article I Section 24 of the Constitution of Utah. Reference should again be made here to the fact that the South Salt Lake ordinance at issue is a copy of an ordinance passed a few months before the South Salt Lake ordinance, by Salt Lake County. For sometime before passing the present county massage ordinance, Salt Lake County has had in effect §16-23-4 of their revised ordinances, defining and punishing prostitution. The act reads as follows:

> Section 16-23-4. Prostitution.
> (1) Any female person who performs, solicits offers or agrees to perform any of the following acts for money or other consideration commits an act of prostitution:
> (a) Any act of sexual intercouse; or
> (b) Any act of deviant sexual conduct.
>
> (2) Deviant sexual conduct for the purpose of this section means:

> (a) Any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.
> (b) Any lewd fondling or touching of either the female person or male person with the intent to arouse or satisfy the sexual desires of either the male person, female person, or both.
>
> (3) A person convicted of prostitution shall be fined not to exceed $299 or imprisoned in the county jail not to exceed 6 months, or both. (Emphasis added).

Salt Lake County, then, has passed an ordinance in direct conflict with the prostitution statute of the State of Utah. In all areas of the state outside of Salt Lake County, prostitution means one thing, and in Salt Lake County, it means far more. Even the most tortured reading of the second Allred decision does not give the county authority for doing this. The fact that the ordinance was passed long before the new criminal code defining what prostitution is in the State of Utah, would seem to read a simply overruling of the county by the state. Going back to the second Allred decision, the majority of the court, upon rehearing, stated:

> There is nothing in the state statutes regulating sexual offenses that evidences any express or implied intent to preclude local governments from also attempting to prohibit and supress the difficult problem of the sex offender. Therefore, it is our opinion that the city is not precluded in enacting the ordinance in question unless it is inconsistent or in conflict with the state's statutes dealing with sex offenses. (Emphasis added). 437 P.2d at 436.

The county, in passing their version of §3B-8-5(3) (their §15-18-5(3)) were restating their obviously invalid view of prostitution. Section 5(3) of the county and city massage ordinances is directly in conflict with the state law. It is not designed to suppress something the state has declared to be prostitution. While the state, in addition to its prostitution laws, prohibited certain unnatural sex acts, under the heading of "sodomy" (§76-5-403 U.C.A.) and also prohibited adultery (§76-7-103 U.C.A.) and fornication (§76-7-104 U.C.A.) the decision was clearly made that the conduct defined as prostitution and deviant sexual conduct by the county, was not a crime. The county prostitution ordinance, and this portion of the county massage ordinance, are not intended to attack "the difficult problem of the sex offender" because, in fact, a person engaging in the conduct prohibited by the ordinance section at issue here is not a sex offender.

It is appropriate here to refer to the case of In re Lane, 372 P.2d 897 (Calif. 1962) in which the Supreme Court of California stated as follows:

> Defendant was convicted of the crime of "resorting," after a court trial in the Municipal Court for the Los Angeles Judicial District on two charges of violating §51.07 of the Los Angeles Municipal Code, which provides: "No person shall resort to any office building or to any room used or occupied in connection with, or under the same managment as any cafe, restaurant, soft drink bar, liquor establishment, or

> similar businesses or to any public park or to any of the buildings therein or to any vacant lot, rooming house, lodging house, residence,apartment house, hotel, house trailer, street or sidewalk for the purpose of having sexual intercourse with a person to whom he or she is not married, or for the purpose of performing or participating in any lewd act with any such person. 372 P.2d at 898.

The Court, at page 899 of the decision, lists numerous acts of sexual intercourse which have been made illegal by the state, and then goes on to list lewd acts in public places, crimes against children, indecent exposure, obscene exhibitions and acts against public decency as being outlawed by the State of California. Defendant was accused of going from her own living room to her own bedroom "for the purpose of having sexual intercourse with a male to whom she was not married." 372 P.2d at 898. In striking down the ordinance, the court stated:

> Although living in a state of cohabitation and adultery is prohibited, neither simple fornication or adultery alone nor living in a state of cohabitation and fornication has been made a crime in this state. (citations omitted)
>
> Accordingly, a city ordinance attempting to make sexual intercourse between persons not married to each other criminal is in conflict with the state law and is void. 372 P.2d at 900.

In this state of course, sexual intercourse between unmarried persons has been made a crime, although rarely enforced. The mere touching without sexual conduct, has not been made a crime. The city may not add numerous new sex crimes to what

the state legislature has declared is the public policy of the state.

POINT II

SECTION 3B-8-5 (3) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS INVALID AS DENYING EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I SECTION 2 OF THE UTAH CONSTITUTION.

When Salt Lake County passed Title XV Chapter 18 of its revised ordinances, its massage ordinance, it appeared to be prohibiting, in §5(3), conduct it had already attempted to prohibit in §16-23-4 (2)(b), although that ordinance is extremely vague and overbroad. This ordinance went a step further, however, in eliminating the requirements that the act is done for a fee and that it is done with the intent to arouse or satisfy the sexual desires of either person involved. The City of South Salt Lake, by adopting the latter ordinance and not the former, has clearly prohibited conduct by a masseur that is not prohibited to anyone else in its confines. It is not a crime in the City of South Salt Lake, or other cities whose ordinances I have checked, for two consenting adults, married or unmarried, for a fee or not for a fee, to touch each other wherever they please, as long as it is not done in a place open to public view (which would render it "lewdness" in violation of §76-9 702 U.C.A.) and no sexual contact, as defined in State Statute, results therefrom. Therefore, if a person is licensed as a

masseur, he is subject to imprisonment for the same kind of conduct which any other person may engage in with impunity. There can be little doubt that a masseur's right to equal protection of the law under both State and Federal Constitutions is thereby abridged. The Supreme Court of Colorado, in People v. Calvaresi, 534 P.2d 316 (Colo. 1975) stated that

> Equal protection of the law is a guarantee of like treatment of all those who are similarly situated. Classification of persons under the criminal law must be under legislation that is reasonable and not arbitrary. There must be substantial differences having a reasonable relationship to the persons involved and the public purpose to be achieved. 534 P.2d at 318.

Prostitution is prohibited by the State of Utah not only because it is an offense to the morality of a majority of its citizens, but because it is a widely known and easily proved source of disease and other social ills. All prostitution is prohibited for the same reasons, whether it be in the open on the street, by a sophisticated telephone solicitation system, in massage parlors or wherever else it may be found. No such proof of evil can be shown by the city officials who wish to stamp out the conduct at issue here. But even assuming that such could be proved, there is certainly no evidence anywhere that such conduct is only offensive and only creates harm when preformed by licensed masseurs. Unless the City can show that prohibiting such conduct only on the part of licensed masseurs is a classification which has a rational basis, it may not

prohibit that conduct which would be legal when performed by other people, including street prostitutes or call girls. As the Supreme Court of California observed, in People v. Romo, 534 P.2d 1015 (Calif. 1975):

> The constitutional guaranty of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. 534 P.2d at 1020.

This position is also borne out by the case of Gilmore v. Green County Democratic Party Executive Committee, 435 F.2d 487(5th cir. 1970) in which the Federal Circuit Court stated:

> As all know, the State Statute or State action which grants to some what it denies to others, violated the equal protection provisions of the Federal Constitution, unless the deprivation is suffered as the result of the State's placing persons into different classes, and such classification is a reasonable one. 435 F.2d at 491.

The City Attorney of the City of South Salt Lake, when confronted in the District Court (oral arguments made off the record in Hollingsworth v. City of South Salt Lake, Supreme Court #16,831) with this equal protection contention, replied that the City was prohibiting the conduct in a place where they had trouble with it. He added, that if they had had trouble with such conduct in grocery stores, it would have been prohibited there. The argument of course, avoids the question at hand. Either the conduct proscribed is legal or it is illegal. The fact that licensed masseurs may be among those who are most likely to engage in

the conduct proscribed is not sufficient reason for proscribing the conduct. The burden of proof must be on the city to show that there was indeed some rational basis for singling out one class of people for criminal liability for conduct not prohibited the general public.

POINT III

SECTION 3B-8-5 (3) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS VOID FOR VAGUENESS.

It is a settled rule of law that a statute written so vaguely that it does not set out a clear standard of the behavior prohibited, is void as a denial of due process of law, as guaranteed by the 14th amendment to the United States Constitution and Article I Section 7 of the Constitution of Utah. That standard was set out, among other places, in Champlin Refining Company v. Corporation Commissioner 286 U.S. 210, 76 L.Ed. 1062, 52 S.Ct. 559 (1932) where the United States Supreme Court said:

> In light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for there violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. (citations omitted.) 52 S.Ct. at 568.

In a previous case involving the regulation of massage parlors, Jensen v. Salt Lake County Board of Commissioners, 530 P.2d 3 (Utah 1974) this court invalidated a county ordinance on the

basis of vagueness, in the following language:

> The trial court was of the opinion that the language of the ordinance was so vague and uncertain as to render it invalid. We conclude that that determination by the trial court was correct. A person who might wish to enter the field covered by the ordinance would be unable to determine from this wording what qualifications or skill would be necessary to qualify for a license. It is noted that the ordinances uses the term "massage therapist" but nowhere is that term defined. 530 P.2d at 4.

Unlike the County Prostitution Ordinance which prohibits "lewd fondling or touching...with the intent to arouse or satisfy the sexual desires...." and the State Statute on forcible sexual abuse,(§76-5-404 U.C.A. (1953) as amended), which prohibits touching "the genitals of another ...with the intent to arouse or gratify the sexual desire of any person, without the consent of the other person," the ordinance at issue here does not require any intent. It also does not require the act to be for compensation. This gives lower courts a wide latitu as to how to interpret the ordinance. This court, in State v. Peterson, 560 P.2d 1387 (Utah 1973) ruled that touching for the purposes of forcible sexual abuse could be done even through a layer of clothing (at page 1390-1391). Without the requirement of any intent, a masseur may be convicted for brushing past or bumping into the genitals of a customer, even when the customer is fully clothed, or is covered with a towel as most customers are where defendant was employed at the time of this incident. Reading the ordinance so as not to require any kind of sexual

intent for a conviction, certainly renders the ordinance so vague and overbroad as to constitute the denial of due process of law.

CONCLUSION

Because the ordinance under which defendant was convicted is in direct conflict with the several constitutional and statutory provisions stated above, the court should declare §3B-8-5 (3) of the Revised Ordinances of the City of South Salt Lake void and of no effect, and should order the prosecution of defendant under the named section of the ordinance dismissed and defendant discharged.

RESPECTFULLY SUBMITTED this 23 day of July, 1980.

W. Andrew McCullough
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed 2 true and correct copies of the foregoing Brief of Appellant postage prepaid, to Clint Balmforth, Attorney for Defendant-Respondent, 2500 South State Street, Salt Lake City, Utah 84115, this 23 day of July, 198

Diana Larsen